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No. 07-1576

In the Supreme Court of the United States

RIDGE CHRYSLER JEEP, LLC,
DOING BUSINESS AS MARQUETTE CHRYSLER JEEP,
AND SALES, INCORPORATED, DOING BUSINESS
AS DODGE MIDLOTHIAN,

Petitioners,

v.

DAIMLERCHRYSLER FINANCIAL SERVICES
AMERICAS LLC, FORMERLY KNOWN AS
DAIMLERCHRYSLER SERVICES NORTH
AMERICA LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should grant certiorari to decide whether dismissal of a lawsuit as a sanction for litigation misconduct must be based on clear and convincing evidence of misconduct, rather than a preponderance of the evidence, when (i) the parties always assumed that a clear and convincing standard applied, (ii) the Seventh Circuit commented that preponderance seemed to be the proper standard but expressly declined to overrule its own precedent requiring clear and convincing evidence, and (iii) the Seventh Circuit concluded that the standard of proof was irrelevant to the outcome of the case because "the district court's findings suffice on any standard." Pet. App. 6a.

2. Whether the Court should grant certiorari to decide the fact-bound question of whether dismissal of the lawsuit at issue here was an abuse of discretion.

RULE 29.6 STATEMENT

Respondent DaimlerChrysler Financial Services Americas LLC (referred to herein as "Chrysler Financial") is a wholly-owned subsidiary of FinCo Intermediate HoldCo LLC, which is a wholly-owned subsidiary of Chrysler Holding LLC. An affiliate of Cerberus Capital Management, L.P. owns 80.1% of Chrysler Holding LLC; the other 19.9% is indirectly owned by Daimler AG, which is a publicly-held corporation organized under the laws of the Federal Republic of Germany.

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E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, SUPREME COURT PRACTICE (9th ed. 2007) 24

RESPONDENT'S BRIEF IN OPPOSITION

Petitioners contend that there is a conflict in the Circuits concerning the quantum of proof necessary to support dismissal of a federal court action as a sanction for litigation misconduct. Petitioners point out that a number of cases, including *Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003), have applied a clear and convincing standard of proof. They argue that in this case a panel of the Seventh Circuit "expressly reject[ed]" *Maynard* and adopted a preponderance of the evidence standard instead. Pet. 8. In fact, the panel here did not purport to overrule *Maynard*, nor did it adopt a preponderance standard. Accordingly, there is no conflict in the Circuits and no basis for granting certiorari on that issue.

As described in greater detail below, the district court in this case applied the evidentiary standard petitioners claim it was required to apply, concluding that there was "clear and convincing evidence" of a pattern of misconduct by petitioners that warranted dismissal. As the court explained:

> This clear and convincing evidence reveals that the Plaintiff, Gorman, lied in an affidavit submitted to the court in order to gain a monetary and strategic advantage over Defendant; misled Defendant as to the existence and location of evidence (the computers) which resulted in that evidence not being available for Defendant's use in these proceedings; and either lost key pieces of evidence (notes of his conversations with Defendant's agents) or fabricated their existence in the first instance, in an effort to bolster his

> position before the court and to inflame the passions of the court and the public.

Pet. App. 37a.

On appeal, both parties assumed that a "clear and convincing" standard of proof applied; their arguments focused on whether the district court's findings of misconduct under that standard were clearly erroneous. In his opinion for the court affirming the judgment, Chief Judge Easterbrook discussed the burden of proof issue *sua sponte*. He suggested that *Maynard* might have been wrongly decided, noting that it did not cite certain decisions by this Court "which hold that heightened burdens of proof do not apply in civil cases unless a statute or the Constitution so requires." Pet. App. 6a. Judge Easterbrook observed that "[n]either a statute nor the Constitution requires an elevated burden for dismissal as a sanction, when the burden in the underlying suit is the preponderance of the evidence." *Id.* But he expressly stopped short of adopting preponderance as the standard, stating that "we need not decide today whether the time has come to overrule *Maynard*, as the district court's findings suffice on any standard." *Id.*

That Chief Judge Easterbrook questioned the viability of *Maynard* both in this case and in his earlier opinion in *Wade v. Soo Line R.R. Corp.*, 500 F.3d 559, 561 (7th Cir. 2007), does not provide a basis for declaring the existence of a Circuit split. Nor would this case provide an appropriate vehicle for deciding the issue even if there were a conflict in the Circuits. Here, the magistrate, the district court and three Seventh Circuit judges all agreed that petitioners' misconduct was sufficiently clear to warrant dismissal even if a clear and convincing standard ap-

plied. Thus, a decision in petitioners' favor on their first question presented would have no impact whatsoever on the outcome of this case.

Petitioners' second question presented also provides no basis for granting review. Petitioners complain that, in the Seventh Circuit at least, dismissal is an over-used sanction that should be invoked only as a last resort. But they point to no principle of law that they claim was improperly applied in this case. Instead, their argument appears to be that, on the facts, their misconduct was not sufficiently egregious to warrant the imposition of dismissal as a sanction. However, the courts below disagreed. In fact, the Seventh Circuit went so far as to describe petitioners as having "behaved like a pack of weasels" during the course of the litigation, concluding that they had forfeited their right to litigate their "dubious" claims of discrimination on the merits. Pet. App. 8a. Petitioners offer no explanation why this Court should grant certiorari to review the entirely fact-bound question of whether that conclusion was adequately supported by the record below.

At the end of their Petition, petitioners contend that the district court should at least have granted them an evidentiary hearing on the various claims of misconduct asserted by respondent. Any argument that petitioners were entitled to a hearing, however, is doubly waived. At oral argument on the motion for sanctions in the district court, the court expressly asked whether it was required to hold an evidentiary hearing. Petitioners did not respond by claiming that a hearing was required, nor did they ever ask for an evidentiary hearing. Instead, they made the tactical choice to argue instead that the record did not support the magistrate's findings. On appeal, petitioners did not argue that they should have been afforded a

hearing in the district court. It was not until virtually the last sentence of their Petition for Rehearing in the Seventh Circuit that petitioners first raised the issue—far too late to preserve it for review in this Court.

STATEMENT

A. The Underlying Lawsuit.

Petitioners owned two Dodge/Chrysler dealerships in the Chicago area, Marquette Chrysler Jeep and Dodge of Midlothian. Counterclaim Answer (R.45) ¶¶ 6-9. Gerald Gorman was the owner and president of both petitioners; he and his wife personally guaranteed petitioners' obligations to respondent Chrysler Financial. *Id.* ¶¶ 62-63. Chrysler Financial provided floor-plan financing to Midlothian and also provided financing to some, but not all, of the dealerships' customers who bought their vehicles through installment contracts. Counterclaim (R.13) ¶¶ 12, 53-55; Complt. (R.1) ¶¶ 17-18.

In early 2001, Chrysler Financial discovered that more than fifty installment contracts it had purchased from Marquette were backed by false credit applications. Counterclaim (R.13) ¶ 56. Chrysler Financial suspected that Marquette employees had been complicit in the fraud, which included overstating the invoice/wholesale value of the vehicle, reporting down payments that were inflated or nonexistent, and naming one of three fictitious companies as the customer's employer. Under the governing agreements, however, Chrysler Financial did not have to prove Marquette's involvement in the fraud to hold it liable for defaults. Marquette had warranted the accuracy of all credit applications it submitted to Chrysler Financial and had agreed to pay for any defaults in contracts backed by materially

inaccurate applications. *Id.* ¶ 55. In February 2001, Marquette signed an agreement with Chrysler Financial acknowledging its liability for all of the fraudulent deals it had entered into. *Id.* ¶ 60, Ex. 19.

In December 2002, Chrysler Financial conducted a "Limited Financial Review" of Midlothian's books and discovered that Midlothian had overstated its working capital by $2 million. Counterclaim (R.13) ¶¶ 37, 41. Among other things, the review turned up evidence that Midlothian had understated its accounts payable and overstated its cash and that Gorman and his CFO had used Midlothian as their own personal piggybank, dipping into cash to pay for a variety of personal expenses. Chrysler Financial also discovered that Gorman had caused Midlothian to repay $1 million of a debt it owed to him, in violation of the terms of a subordination agreement. *Id.* ¶ 43. On December 20, 2002, Chrysler Financial sent a notice of default to Midlothian, warning that its financial statements were materially inaccurate and that it needed an immediate infusion of $2.1 million in permanent capital to maintain a sufficient working capital level. *Id.* ¶¶ 46-47, Ex. 16.

In February 2003, petitioners filed their complaint in this action, accusing Chrysler Financial of racial discrimination. R.1. Although petitioners' owners are white, many of their customers were African-American. Petitioners alleged that Chrysler Financial discriminated against African-American customers in purchasing installment contracts, hurting petitioners' vehicle sales. In support of their redlining allegations, petitioners quoted a litany of racial slurs that they claimed Chrysler Financial employees had used in conversations with Gorman and

other white dealership employees. *See* Pet. 3-6.[1] Petitioners claimed that they had threatened to sue Chrysler Financial over its alleged discrimination and that the limited review Chrysler Financial undertook of Midlothian at the end of 2002 had been designed both to silence them and to coerce payment of the amounts still outstanding on the Marquette fraud deals, which petitioners claimed they had no responsibility to pay. Complt. (R.1) ¶ 131.

Petitioners claimed that Chrysler Financial's alleged misconduct had forced Marquette to sell its dealership in January 2003 and had imposed significant losses on Midlothian. *Id.* ¶¶ 153-55. They sought to recover these losses on the theory that Chrysler Financial had breached its contractual obligations, tortiously interfered with their relationships with prospective vehicle purchasers, and violated state and federal dealer protection statutes. *Id.* ¶¶ 157-94.

On the same day that petitioners filed this lawsuit, their attorneys filed another lawsuit on behalf of a purported class of African-American purchasers whose credit applications had been rejected by Chrysler Financial. *Coburn v. DaimlerChrysler Services North America, LLC*, No. 03 C 759 (N.D. Ill.). Like the complaint in this action, the class complaint

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[1] As explained *infra* at 13-14, Gorman claimed that the lengthy quotations set forth in the complaint were based on contemporaneous notes he had taken of the conversations in question. But when Gorman was unable to find notes verifying all of the statements in the complaint, he testified that he had misplaced or lost 8-10 pages of notes. When respondent sought sanctions as a result of petitioners' failure to preserve crucial evidence, Gorman changed his story, claiming that the notes never existed in the first place.

catalogued at great length the racial slurs allegedly used by Chrysler Financial employees and claimed that Chrysler Financial had a policy of discriminating against African-American applicants. The filing of the class action, which has since been resolved in a settlement in which no money damages were paid to class members, was accompanied by widespread publicity. A32.

Chrysler Financial denied petitioners' allegations of discrimination and counterclaimed against petitioners and the Gormans for $227,270 still owing from Marquette on the fraud deals and $10.2 million due under the floor-plan financing Chrysler Financial had provided to Midlothian. R.13. Chrysler Financial also filed a motion for replevin seeking immediate possession of the vehicles on Midlothian's lot that secured its existing debt. R.16.

B. Plaintiffs' Motion For A TRO.

Petitioners responded to Chrysler Financial's replevin motion by moving for a temporary restraining order and a preliminary injunction to compel Chrysler Financial to continue providing Midlothian with floor-plan financing. R.23. At a hearing on the parties' competing motions, the district court indicated that it was not willing to allow Chrysler Financial to terminate its relationship with Midlothian—which claimed to be "on the precipice of going out of business"—until the serious charges raised in petitioners' complaint were resolved. 1DX Ex. C at 6, 16. The court suggested that a "good interim" solution would be to enter a TRO to maintain the status quo while expedited discovery was conducted. *Id.* at 17. However, the court made it clear that it would not require Chrysler Financial to "writ[e] blank checks" to Midlothian and would take appropriate steps to protect

Chrysler Financial from incurring additional losses. *Id.* at 16. The court suggested that the parties negotiate the terms of an agreed TRO within these guidelines. *Id.* at 12-13, 20-21.

Chrysler Financial argued that it should not be forced to provide financing to Midlothian because the dealership should have been able to find alternative financing from a bank if it were as financially sound as Gorman claimed it to be. Petitioners responded that Gorman had "tried twice" to obtain financing from another source but "because of the litigation has been unsuccessful." *Id.* at 28.

There were also discussions at the hearing about Gorman's assertion that he had already put $1.4 million back into Midlothian since December 2002 when Chrysler Financial had demanded an increase in working capital. Counsel for Chrysler Financial asked petitioners to identify the source of the additional capital and emphasized the need to make sure that it was "unencumbered." *Id.* at 24. Petitioners' counsel responded by stating that "we will sign an affidavit that the money is unencumbered . . . . that there is no loan back, or whatever it is." *Id.*

After the hearing, plaintiffs filed an affidavit signed by Gorman that was designed to assure the court that the TRO was necessary and that Chrysler Financial's interests would be protected. R.29. In the affidavit, Gorman testified that "I went to two different banks to try to take out a loan and to refinance the floor plan at Midlothian. I was turned down by both banks due to issues related to the financial hold and pending litigation with defendant." *Id.* ¶ 12. He also testified that in December 2002 approximately $925,000 in "additional working capital" had been invested in the Midlothian dealership, that it was a

"capital investment," which was "unencumbered," and that the "source of the capital investment was not a loan from a third party that would require repayment from dealership assets, nor was it a withdrawal from a bank account." The affidavit identified the sources of this "capital investment" as "monies obtained from the sale of stock certificates and a direct investment from a long time business associate." *Id.* ¶ 2.

After the affidavit was filed, the court entered a stipulated TRO that required Chrysler Financial to continue supplying Midlothian with floor-plan financing for a period of 180 days. 1DX Ex. O. Paragraph 9 of that Order provided that "Midlothian represents and warrants that a $925,000 equity capital infusion has been made, which is unencumbered and not . . . subject to repayment by Midlothian to the investment source." *Id.*

C. At Least Two Of The Representations In Gorman's Affidavit Were False.

The district court concluded that there was clear and convincing evidence of two "distinct misrepresentations" in Gorman's affidavit. Pet. App. 30a.

First, the "capital investment" Gorman testified Midlothian had received from a "long time business associate" was not a "capital investment" at all, but rather a loan from Edward R. Vrdolyak, who at the time was one of plaintiffs' attorneys. 1DX, Ex. D.[2] Af-

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[2] Vrdolyak was later disqualified in both the *Coburn* case and this case. *See Coburn v. DaimlerChrysler Services North America, LLC*, 289 F. Supp. 2d 960 (N.D. Ill. 2003). R.102 at 19. In his opinion disqualifying Vrdolyak in this case, the magistrate judge stated that he was troubled, not only by unethical contacts Vrdolyak had with a Chrysler Financial employee, but also by his "questionable" business dealings with Gorman pur-

ter months of effort and a successful motion to compel, Chrysler Financial finally obtained a copy of the check Vrdolyak had written for $750,000 made payable to "Midlothian Dodge," which was described in the memo section as a "LOAN." *Id.* Vrdolyak also produced a hand-written agreement documenting a $750,000 "loan from Edward R. Vrdolyak to the aforesaid Midlothian Dodge." 2DX Ex. 65. The agreement provided that the loan would be collateralized by Midlothian's used car inventory. *Id.* In addition, as the magistrate found, "to the extent payments were being made on that loan, they were being made out of the coffers of the dealership, not out of Mr. Gorman's personal coffers." Pet. App. 66a.

On appeal, petitioners conceded that the affidavit "may have been inaccurate" in certain respects, but argued that the inaccuracies were immaterial because, after the loan agreement was signed, Vrdolyak had orally agreed to give up his lien on Midlothian's inventory and he and Gorman had supposedly agreed to treat Gorman, rather than Midlothian, as the obligor on the loan. Petitioners' Seventh Circuit Br. at 18. As the Seventh Circuit noted in its opinion, petitioners' explanation "is unhelpful, even if true, for Gorman assured Judge Andersen that he had raised new equity capital" from a third party, rather than taking out a loan. Pet. App. 6a. In any event, the Seventh Circuit concluded that the district court's finding that Midlothian remained the obligor on the loan was not clearly erroneous in light of the clear documentary evidence of a loan to the dealership and the admitted fact that the only loan payments had come from Midlothian. Pet. App. 6a-7a.

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suant to which Vrdolyak received $10,000 a month from the dealership "in exchange for, essentially, nothing." *Id.*

Second, the district court concluded that there was also clear and convincing evidence that Gorman had lied when he testified in his affidavit that he had twice tried and failed to obtain floor-plan financing from another source after Chrysler Financial put Midlothian on financial hold in December 2002. *Id.* at 26a, 31a. The magistrate branded this statement as the "most blatant of the lies alleged," *id.* at 74a, because during the course of discovery petitioners admitted that Gorman had not contacted any potential lenders until *after* the TRO was entered. 1DX Ex. G at 2584-86. After the motion for sanctions was filed and Gorman realized that he had effectively confessed to perjuring himself in his affidavit, he attempted to remedy the situation by submitting another affidavit claiming that he had spoken with one bank before the hearing. But, as the Seventh Circuit noted, the "district court didn't have to buy the latest story." Pet. App. 7a.

D. Petitioners Violated A Court Order To Produce Midlothian's Computer.

The district court also concluded that there was clear and convincing evidence that petitioners had misled respondent about the whereabouts of Midlothian's computer, in violation of a court order requiring them to produce the computer and all of their computerized records. Early on in the litigation, Chrysler Financial served document requests asking petitioners to produce all of their general ledger and accounting information, both in paper and electronic form. 2DX Exs. 1 (at 9-10) and 2 (at 12-13). Although petitioners eventually produced documents in response to this request, there were many obvious gaps in their production, which included the most crucial time periods that were at issue in the lawsuit.

Respondent's counsel spent months trying to track down the missing information. When respondent asked for financial information on discs or hard drives, petitioners' counsel responded that petitioners had none. 2DX Ex. 5. They also told respondent that Midlothian, which had gone out of business, no longer had "access" to computerized information systems that it had leased from a company called Reynolds & Reynolds. 2DX Ex. 4.

On April 30, 2004, the magistrate entered an order requiring plaintiffs to produce "the monthly accounting journals and schedules for the years 2000 and 2001, and the electronic records of Midlothian called the Reynolds & Reynolds materials, including the tapes, printouts and any other financial material stored in their computers." R.127. When this order was issued, the Midlothian computer was still on the dealership's premises. It remained there for another five months until October 2004, when it was finally repossessed. 1DX Ex. T-2 at 68. Nevertheless, plaintiffs never revealed the computer's whereabouts. Instead, they continued to claim that they had no "access" to the computer. *See* 2DX Ex. 7.[3] It was not until the end of discovery, when the computer was already long gone, that Midlothian's former CFO

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[3] The district court concluded that Gorman lied when he was asked about the computer's whereabouts in his June 2004 deposition. Pet. App. 32a. Although petitioners concede that the computer was still in its usual spot at the dealership at that point in time, Gorman testified that he had no idea what had become of the computer or its hard drive. He also testified that he had just recently been at the Midlothian offices and had "checked every square foot of those two buildings for any possible thing," but had not seen "any computers laying around the store," and that his CFO had searched for the computers and been unable to find them. 1DX Ex. G at 494-505.

finally disclosed in deposition testimony that the computer had been on the premises until October 2004. *See* 1DX Ex. T at 74.

The magistrate concluded that petitioners had at the very least "misle[d]" Chrysler Financial about the whereabouts of Midlothian's computer by engaging in "semantic[] gamesmanship." Pet. App. 83a. The district court agreed, concluding that there was clear and convincing evidence that plaintiffs "concealed the true nature of the location of [their] computers by stating in April 2004 that they did not have access to the computers," when they were admittedly still on-site at the Midlothian dealership. *Id.* at 32a. "[E]ven giving Plaintiffs the benefit of their interpretation" of what "access" meant, the court found that "their incomplete answer regarding lack of access was given to mislead Defendant into believing that the computers were not in existence." *Id.*

E. Gorman's Missing Notes Provided Additional Support For The Conclusion That Dismissal Was Warranted.

The centerpiece of petitioners' complaint was a series of lengthy block quotes of statements allegedly made by Chrysler Financial employees in which they purportedly used a variety of racial slurs and openly admitted to discriminating against petitioners' African-American customers. *See, e.g.*, Complt. (R.1) ¶¶ 28-29. At his July 2004 deposition, Gorman testified that when these types of statements had first surfaced, his attorney had advised him to take contemporaneous notes of the meetings. 1DX Ex. G at 653-54. In response to Chrysler Financial's discovery requests, petitioners had produced some of Gorman's handwritten notes. At the deposition, defense coun-

sel asked Gorman to identify where particular statements alleged in the complaint were documented in those notes.

When Gorman was unable to find any reference in his notes to certain alleged statements, he testified that he had taken notes but that they must have been lost or even stolen: "I know I took notes from a couple of meetings. I don't know if I misplaced them. I've looked, but my office [was] never locked." *Id.* at 690. *See also id.* at 694 ("we did have some notes that I have not been able to find"); *id.* at 705 ("I had notes that I can't find"). When pressed about the missing notes, Gorman testified that "I have to be missing maybe eight, ten pages of notes." *Id.* at 838. Gorman testified that he had already searched for and been unable to find his missing notes: "I've looked at home thinking I might have taken them home. I have looked through the office. I know there is more [*sic*] notes." *Id.* at 837.

Gorman was deposed in both this case and the discrimination case brought on behalf of petitioners' customers. At each deposition, Gorman told a consistent story—that he had made 8-10 pages of handwritten notes that would have supported the allegations of the complaint, but that he had not been able to locate those notes despite a diligent search. When Chrysler Financial moved for sanctions based on petitioners' failure to preserve critical evidence, however, Gorman's story suddenly changed. He submitted a "supplemental affidavit" claiming that he had been confused at (apparently all of) his deposition sessions by the way he was questioned, that he had not personally made 8-10 pages of additional handwritten notes, that he had not lost any notes, and that, when he referred to 8-10 pages of his own handwritten notes, he had actually been thinking

about a typed, 5-page summary that his former CFO had written, which had been produced to Chrysler Financial. 1PX A-36.

The magistrate found Gorman's affidavit "self-serving, convenient and, frankly, fishy." Pet. App. 91a. Given Gorman's track record of being "at best, deliberately obtuse, and, at worst, completely dishonest, in a formal court proceeding," the magistrate concluded that the missing notes were yet another factor supporting dismissal as a sanction. *Id.* at 92a.[4]

The district court agreed with this analysis and concluded that clear and convincing evidence showed that Gorman "either lost key pieces of evidence (notes of his conversations with Defendant's agents) or fabricated their existence in the first instance, in an effort to bolster his position before the court and to inflame the passions of the court and the public." *Id.* at 37a.

F. The Magistrate's Report.

After discovery closed, Chrysler Financial filed a motion for summary judgment on all of plaintiffs' claims. R.183. At the same time, it filed two motions

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[4] Gorman's "track record" of dishonesty includes his admission that two dealership applications he had submitted to Daimler-Chrysler contained a variety of misstatements. In those applications, Gorman falsely claimed to have graduated from the University of Arizona with a degree in biochemistry and to have completed two years of medical school; he also gave inaccurate answers to questions about his employment history to conceal the fact that he had been barred from working in the securities industry. R. 265, Ex. 15 at 239-67. Gorman characterized these misrepresentations as "oversights" and disclaimed responsibility for them, although he acknowledged that he had signed the documents. *Id.* at 242, 255.

for sanctions, seeking dismissal of petitioners' complaint with prejudice and the entry of judgment on its counterclaim on two separate grounds: (1) that petitioners had made false statements during the proceedings on their motion for a TRO (R.180) and (2) that petitioners had intentionally failed to preserve and produce critical evidence (R.181).

The sanctions motion was referred to Magistrate Judge Keys, who issued a 48-page report and recommendation. As described above, Judge Keys concluded that Gorman's affidavit contained two false statements which led "at least in part, to the April 11, 2003 Order requiring Chrysler to extend additional floor plan financing to the plaintiffs which, in turn caused Chrysler to suffer additional losses." A80-81. He concluded that "[d]eliberately providing false information to the Court to achieve one's objective cannot be condoned and certainly warrants the harshest of sanctions." Pet. App. 75a.

In addition, Judge Keys found that Gorman "either lied or misled Chrysler during the discovery that occurred after the Stipulated Order was entered." *Id.* at 94a. The magistrate recommended dismissal of the complaint as the appropriate sanction for petitioners' misconduct, noting that in light of Gorman's "demonstrated willingness to evade, mislead, and lie. . . he cannot be relied upon to play by the rules of this Court." *Id.*

G. The District Court's Decision.

Petitioners filed timely objections to Judge Keys' report. R.261. After those objections were briefed, the case was transferred from Judge Andersen, who had presided over the TRO hearings, to Judge Kendall. R.274.

The district court held oral argument on petitioners' objections in February 2006. R.280. At that hearing, the court asked whether it was required to have a "testimonial hearing in order to make my own determination as to whether or not" Gorman and petitioners had been telling the truth. Supp. R., 2/24/06 Tr. at 16. Petitioners did not argue that a hearing was required, nor did they ever file a motion asking the court to convene an evidentiary hearing on the sanctions motions.

Ultimately, the district court issued a 26-page opinion reviewing the record de novo and concluding that there was clear and convincing evidence of two false statements in Gorman's affidavit and of willful concealment of evidence as a result of plaintiffs' failure to turn over the Reynolds & Reynolds computer during discovery. Pet. App. 26a. The court also concluded that the other issues raised by Chrysler Financial in its sanctions motion—including the missing notes—provided additional support for the conclusion that "the case had been tainted with discovery violations and at least misleading statements throughout its course." *Id.*

On the issue of remedy, the district court stated that dismissal can be imposed as a sanction only where there is "clear and convincing evidence" of "contumacious conduct" or discovery violations where the "offending party has demonstrated wilfulness, bad faith, or fault." *Id.* at 27a, 36a. The court noted the factors that must be weighed in choosing between dismissal and a lesser sanction: prejudice to the defendant, prejudice to the judicial system and the need for deterrence and punishment. *Id.* The court concluded that all of these factors weighed in favor of dismissing petitioners' complaint. First, it

concluded that "[t[here is no doubt that Chrysler has been prejudiced by the conduct of Plaintiffs throughout this case." *Id.* at 39a. That prejudice included not only being forced to provide floor-plan financing to Midlothian for an additional six months, which imposed an additional loss of $500,000 on Chrysler Financial, but also losing access to discovery materials that were the "key elements to Chrysler's defense." *Id.*

Second, the district court concluded that the prejudice to the legal system "merits the harsh sanction of dismissal." *Id.* Prior sanctions imposed on petitioners during the course of discovery had not had any deterrent effect.[5] Moreover, petitioners' evasive conduct during discovery, including their efforts to avoid revealing Vrdolyak's role in financing Midlothian, were "not the actions of truth-seeking individuals intent on having their day in court, but rather, sleight of hand tactics of manipulators seeking to use the federal court system to their own advantage." *Id.* at 39a-40a. Even without prejudice to respondent, the court concluded that petitioners' "flagrant violations" would be enough to support dismissal of the case. *Id.*

Finally, the district court concluded that the lesser sanctions petitioners had proposed—such as fines or adverse jury instructions—would be inade-

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[5] The court had granted a number of motions to compel and had awarded attorneys' fees to respondent. R.101. Judge Keys had also ordered Gorman to submit to an additional deposition on damages and ordered petitioners to pay all of the costs of that additional deposition, including respondent's attorneys' fees. R.139. When petitioners identified a damages expert months after the deadline for doing so had passed, Judge Keys struck their expert. R.169.

quate. The court concluded that the harm to petitioners from dismissal "is more than outweighed by the harm to Chrysler and to the legal system as a whole that would flow from any decision to allow Plaintiffs to continue to prosecute their case." *Id.* at 41a.

H. The Seventh Circuit's Decision.

Petitioners appealed to the Seventh Circuit, arguing that the district court's findings were clearly erroneous and that, even if those findings were justified, they did not warrant dismissal of the complaint as a sanction for misconduct. In briefing the appeal, both sides assumed that only clear and convincing evidence of misconduct would suffice to support a dismissal sanction.

The Seventh Circuit affirmed. The panel concluded that the district court's findings were not clearly erroneous, whether a preponderance or a clear and convincing standard was applied. Pet. App. 6a. Petitioners' arguments on the facts were rejected as "uniformly unconvincing." *Id.* And the court found no abuse of discretion in the district court's selection of dismissal as a sanction. It acknowledged that the "penalty must be proportional to the wrong," but concluded that this principle did not help petitioners: "One who misuses litigation to obtain money to which he is not entitled is hardly in a position to insist that the court now proceed to address his legitimate claims, if any there are." *Id.* at 8a.

The court rejected petitioners' argument that they were entitled to have their claims of discrimination decided on the merits. In light of Gorman's inability to produce the notes he claimed to have made, the court found those claims to be "dubious." *Id.* Having "behaved like a pack of weasels," petitioners

"can't expect any part of their tale be believed." *Id.* In any event, the court noted that any discrimination was actionable by the victims of the alleged discrimination—petitioners' customers, on whose behalf a complaint had already been filed and settled. "The dealerships are only incidental losers (if discrimination occurred at all), and this suit need not be kept alive on that account." *Id.* at 8a-9a.

REASONS FOR DENYING THE PETITION

A. There Is No Circuit Split.

The Petition rests on the erroneous assumption that the Seventh Circuit adopted a preponderance of the evidence standard of proof in this case, thus creating a split with decisions in other Circuits that have required clear and convincing evidence of misconduct to uphold dismissal as a sanction. In support of their claim of a circuit conflict, petitioners quote the portion of the opinion that criticizes the Seventh Circuit's adoption of a clear and convincing standard five years ago in *Maynard v. Nygren*. But petitioners inexplicably ignore the fact that the panel here expressly declined to decide "whether the time has come to overrule *Maynard*" because it was unnecessary to do so since "the district court's findings suffice on any standard." Pet. App. 6a. Because *Maynard* remains the law in the Seventh Circuit, there is simply no conflict for this Court to resolve.

That *Maynard* is still good law is apparent not only from the decision in this case, but also from the Seventh Circuit's own rules. The panel in this case could not have simply overruled the earlier panel decision in *Maynard*. Instead, if a proposed opinion approved by a panel adopts "a position which would overrule a prior decision of this court," Circuit Rule 40(e) requires the opinion to be circulated among the

active members of the court, who then have an opportunity to vote to rehear the issue en banc. When this procedure is followed and a majority of the active judges acquiesce in overruling the court's prior precedent, the opinion is required to carry a footnote to that effect. *Id.* Here, there is no such footnote and nothing else in the opinion to suggest that (contrary to its explicit statement) the panel here intended to overrule *Maynard sub silentio.*

Indeed, it is unclear whether the Seventh Circuit will *ever* choose to overrule *Maynard.* Chief Judge Easterbrook is plainly interested in the burden of proof issue. He raised it *sua sponte* in *Wade v. Soo Line R.R. Corp.*, 500 F.3d at 561, which was issued after briefing in this case had been completed, but before oral argument. In *Wade*, Judge Easterbrook "doubt[ed] that 'clear and convincing' evidence is required" to uphold dismissal as a sanction, but noted that the appellee had not "asked us to revisit *Maynard* . . . and use the preponderance standard, perhaps because the evidence of bad faith is manifest." *Id.* Similarly, in this case, respondent did not ask the court to revisit *Maynard*, instead arguing that there was ample evidence to support the district court's conclusion that there was clear and convincing evidence of the kind of misconduct necessary to warrant dismissing the complaint. Thus, although Chief Judge Easterbrook has twice voiced his doubts about whether *Maynard* employed the correct burden of proof, he still has not had the benefit of hearing argument on both sides of the issue. As a result, it is impossible to say that even he would ultimately vote to overrule *Maynard* by adopting a preponderance standard—particularly if doing so would, as petitioners contend, create a split in the Circuits.

Contrary to petitioners' argument, Judge Posner's opinion for the court in *Ty, Inc. v. Softbelly's, Inc.*, 517 F.3d 494 (7th Cir. 2008), does not indicate any confusion over the burden of proof issue in the Seventh Circuit. *Ty, Inc.*, which was issued two days after the decision in this case, canvasses the law on burden of proof in cases where sanctions are sought. It notes that clear and convincing evidence is ordinarily required to prove fraud, including fraud on the court. *Id.* at 498. It then cites cases, including *Maynard*, suggesting that clear and convincing evidence is required to impose "*any* substantial sanction for misconduct in litigation," whether or not fraud was involved. *Id.* (emphasis in original). Judge Posner observed that *Maynard* involved Rule 37 and that its "soundness was questioned in *Wade*." *Id.* He then went on to discuss the burden of proof in a case like *Ty, Inc.*, where the court's power to sanction was based on its inherent authority.

After considering the function served by the "tripartite division of burdens of proof," Judge Posner voiced his "doubt" as to "whether there is any utility in insisting on proof by clear and convincing evidence in a case such as this . . . and if not whether there should nevertheless be a category of litigation sanctions that require a heightened standard of proof." *Id.* at 499. But, as in this case and in *Wade*, Judge Posner found it unnecessary "to resolve our doubts" because the outcome of the appeal would be the same regardless of whether a preponderance or clear and convincing burden of proof was imposed. *Id.*

Ty, Inc. confirms that it is impossible to tell how the Seventh Circuit would come out if the burden of proof issue were actually argued by the parties in a case where the choice between clear and convincing evidence and preponderance mattered to the outcome

of the appeal. It is possible that *Maynard* might be overruled. It is also possible that the Seventh Circuit might adopt differing burdens of proof for different types of sanctions and that, on close examination, there might be no conflict at all with decisions in other circuits. Yet another possibility is that a majority of the judges in active service would decide that *Maynard* should not be overruled.

Unless and until the Seventh Circuit takes some action to overrule *Maynard*, however, there is no basis for any claim of conflict, either among the Circuits or within the Seventh Circuit, and no need for this Court to take any action to clarify the burden of proof issue. District courts in the Seventh Circuit are required to continue following *Maynard*. As a result, the rule that petitioners claim is the right rule—that dismissal is permissible only if misconduct has been proven by clear and convincing evidence—continues to apply throughout the Circuit.

B. The Burden Of Proof Issue Is Irrelevant To The Outcome Of This Case.

Even if Chief Judge Easterbrook's ruminations about burden of proof could somehow be contorted into a circuit split, this case would not provide an appropriate vehicle to resolve the purported conflict. The outcome here would not change even if this Court were to conclude that clear and convincing evidence of misconduct is required to uphold dismissal as a sanction. The district court decided that misconduct had been established by clear and convincing evidence. And the Seventh Circuit concluded that the district court's findings were not clearly erroneous, even assuming that a heightened burden of proof applied.

That the outcome does not depend on the resolution of the principal question petitioners have presented would be reason enough to deny the Petition even if there were a clear conflict between the Circuits. *See* E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, SUPREME COURT PRACTICE at 248 (9th ed. 2007).

C. Petitioners' Second Question Presented Raises Purely Factual Questions That Do Not Warrant Review.

It is not clear what legal question petitioners seek to raise in their second question presented. Petitioners acknowledge that Rule 37 "grants a court the power to dismiss a case as a sanction for noncompliance with a discovery order." Pet. 21. They also agree that "[i]t is well settled that a court may dismiss an action as a sanction" by invoking its inherent powers. *Id.* Petitioners argue that this power must be exercised with "restraint and discretion." But they offer no basis for concluding that the courts below failed to adhere to these principles.

Petitioners complain that the Seventh Circuit has allowed trial courts to "[r]outinely resort[]" to dismissal as a sanction. Pet. 22. But petitioners cite no statistics to support that conclusion. Nor do they articulate any new or different legal principle they claim this Court should adopt to alter the way in which the Seventh Circuit or other Courts of Appeals approach appeals from orders dismissing a lawsuit as a sanction for litigation misconduct.

Instead, petitioners' argument boils down to the assertion that dismissal was inappropriate under the particular facts of this case. For example, petitioners contend (at 17) that the court here failed to properly

apply the concept of proportionality. The decision, however, plainly recognizes the *principle* of proportionality. *See* Pet. App. 8a ("the penalty must be proportionate to the wrong"). Petitioners' only quarrel is with how that principle was applied to the particular facts of this case. Petitioners argue that the Seventh Circuit arrived at the right result in *Ty, Inc.*, where it overturned a dismissal sanction, while reaching the wrong result here. But the different outcomes can be fully explained by the difference in the facts. In *Ty, Inc.*, the defendant admitted that it had suffered no prejudice apart from attorneys' fees as a result of a single instance of misconduct by the plaintiff. 517 F.3d at 498, 500. Here, by contrast, the district court found that petitioners' repeated misconduct had not only caused respondent to lose an additional $500,000-plus on the Midlothian dealership, but had also effectively hamstrung respondent's defense.

Petitioners further contend that it was error to allow respondent to use Gorman's deposition testimony as the basis for its sanctions motions. Pet. 22. Petitioners contend that respondent should have been relegated instead to using Gorman's various admissions, lies and evasions in his deposition testimony as impeachment at trial. But petitioners cite no legal principle that would preclude a court from considering deposition testimony given under oath in ruling on a motion for sanctions. Instead, petitioners appear simply to be repeating their factual assertion, made and rejected below, that it was "entirely understandable" that Gorman would become "confused" and contradict himself during a lengthy deposition. *See* Petitioners' Seventh Circuit Reply Br. at 5.

Finally, petitioners contend that the district court should have at least held an evidentiary hearing before granting respondent's sanctions motions. Once again, however, petitioners do not contend that an evidentiary hearing is *always* required before a complaint can be dismissed as a sanction; instead, they contend that a hearing should have been held under the facts of this particular case. But any such argument has been doubly waived. Petitioners did not ask the district court to hold an evidentiary hearing, even when the district court raised the issue. And they waived the issue a second time by failing to challenge the lack of a hearing in the Seventh Circuit until they filed their petition for rehearing.

In any event, petitioners had their day in court and then some. They filed voluminous briefs before the magistrate and the district court, both of whom carefully considered all of the various explanations petitioners offered for their conduct during the course of the litigation. The magistrate and the district court both concluded that there was clear and convincing evidence that petitioners had lied to the court and misled respondent in discovery, prejudicing not only respondent's interests but the interests of the legal system as well. On appeal, the Seventh Circuit reviewed these findings regarding "Gorman's chicanery" and found that they were adequately supported. Pet. App. 8a. Petitioners offer no reason why this Court should delve into the complex facts outlined above in order to second-guess that entirely fact-bound conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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